SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 1201

LUCIO J. PEPE,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement

This is a petition for a writ of certiorari to review an order of the New York Court of Appeals entered December 29, 1966, affirming, without opinion, an order of the Appellate Division, First Department, of the Supreme Court of the State of New York, entered April 26, 1966, affirming without opinion an order of the Supreme Court, New York County, entered July 1, 1965, amending, after a hearing as to voluntariness of a confession, a judgment of that court rendered January 4, 1963, convicting petitioner, after trial,

on five counts of unlawful acts in respect to examinations [N. Y. EDUC. L. §225(4), (5), (6)] and one count of conspiracy to commit such crimes [N. Y. PENAL L. §580]. Petitioner Pepe was sentenced to three months' imprisonment on the conspiracy count, and to a suspended sentence on the remaining charges, and is presently at liberty on bail pursuant to a certificate of reasonable doubt issued by a Justice of the Supreme Court, New York County, on January 7, 1963, and a stay of execution of sentence ordered by Mr. Justice HARLAN on February 6, 1967.

The judgment of conviction was affirmed by the Appellate Division on July 2, 1964 (VALENTE, J., dissenting) [21 A. D. 2d 417, 251 N. Y. S. 2d 209]. Appeal having been taken to the Court of Appeals, on January 14, 1965 that Court ordered determination of the appeal withheld [15 N. Y. 2d 764, 257 N. Y. S. 2d 337], and remitted the case to the trial court for further proceedings pursuant to *People* v. *Huntley* [15 N. Y. 2d 72 (1965)] and *Jackson* v. *Denno* [378 U. S. 378 (1964)]. Accordingly, a hearing was held in the trial court as to the circumstances relating to petitioner's confessions, and the trial court held the statements voluntary and admissible. The judgment as so amended was then affirmed on appeal. The instant petition relates only to the hearing on voluntariness, and other matters respecting petitioner's incriminating statements.

A co-defendant, Pietro D'Alba, was convicted of the same charges at petitioner's trial, and participated in the state appellate proceedings. He received a suspended sentence. D'Alba is not a party to this proceeding.

Statement of the Case

Crime and Discovery

Petitioner, Lucio J. Pepe, a licensed New York physician, and Pietro D'Alba, a candidate for the practice of medicine in New York, have been convicted on one count of conspiracy [PENAL L. §580] and five counts of unlawful acts in respect to examinations [EDUC. L. §225(4), (5), (6)], on proof of their participation in a plot to sell to other candidates questions and answers for the June, 1961, New York State Medical Board Examination, before the examination. The scheme was initiated in March, 1961, when the questions for the forthcoming June examination had been composed by the Board of Medical Examiners, and were in the custody of the Examination Editor in Albany, pending editing and printing. At that time, Dr. Stiles Ezell, Secretary of the Board of Medical Examiners, obtained from the Examination Editor, under the guise of routine editorial inquiries, the questions for the June examination (134-6, 173, 208, 210, 252, 353-4).* Ezell transmitted a handwritten copy of the material to petitioner Pepe, at a meeting in the street in New York City (512, 1554-5, 1582-5, 1592-6, 1600-3, 1606-7), and Pepe gave the material to Dr. Luigi Baviello, a practicing New York physician (1559-60, 1575). Pepe and Baviello agreed to sell the questions for $20,000 (504-5, 634-9), and share

* References, unless otherwise noted, are to pages of the typewritten minutes of trial. These minutes were part of the record on appeal to the Appellate Division and the Court of Appeals on the original appeal from judgment. They were introduced at the post-trial hearing on voluntariness as People's Exhibit 2. References marked "H." are to pages of the typewritten minutes of the post-trial hearing and exhibits at the hearing.

the receipts with Ezell (437-8, 500, 634, 641-2, 652-3, 1569-70, 1605-8).

Baviello enlisted D'Alba, who was taking a review course in preparation for the examination. D'Alba agreed to get the money from other candidates in the course (439-42, 504, 597, 599, 603-5, 1624-9, 1654-8), and he solicited several candidates, in order to raise $2500 from each (1630-3, 1664-8, 1702-5, 1731-2, 1751, 1865-6, 1901, 1910-13, 1929, 1981, 1986-7). Shortly before the examination, D'Alba gave Baviello $10,000 for four copies of the questions and answers of the first part of the exam, and was "guaranteed" that the money would be returned if the questions were not correct (509-10, 608). Petitioner Pepe received $5000 from Baviello (510-11, 1568), and gave $1000 to Ezell (H. 115-16, 150).

Just before the examination was administered, however, Ezell reported to Pepe that the exam had been withdrawn in Albany, and another substituted (1570-1, 1575-7, 1604). Pepe warned Baviello that the scheme had been discovered (511). Baviello contacted D'Alba (511, 1636-7), and D'Alba cancelled the deals with his customers (1700, 1704, 1785, 1872, 2059). The money was returned, and the contraband material collected (511, 1568-9, 1637, 1872, 2065) and guiltily destroyed (520, 1639-40).

In the meantime, the New York State Department of Education, joined by the State Police, investigated the scandal, questioned candidates who had been offered the questions (1706-15, 1807-10, 1915-18, 1954, 1957-8), and learned the identities of some of the participants. The investigators spoke to D'Alba on several occasions. Peti-

tioner Pepe substantially revealed his participation to the investigators at a stenographically recorded interview in his room on the evening of July 19, 1961 (1539, 1554-87; H. Exh. 3), and repeated the statement in greater detail the following week at the Department of Education (1588-96, 1600-8; H. Exh. 4). Two weeks later, on August 9, he gave the same statement to the district attorneys, after being warned of his rights (H. Exh. 7).

Trial.

On August 29, 1961, Pepe, D'Alba, and Baviello were indicted for conspiracy and various crimes in violation of Section 225 of the Education Law. Defendant Baviello pleaded guilty to several charges, and petitioner and D'Alba proceeded to trial.

The People's witnesses at trial included administrative personnel of the Department of Education, who described procedures with respect to the state medical examination, and who established the technical elements of the crimes; co-defendant Baviello, who established the participation of Pepe and D'Alba; four candidates for the June, 1961, examinations, who set forth D'Alba's solicitations, and one of whom, Dr. Gasto DeCarlo, described the substantial identity of the questions on the originally scheduled June examination (People's Trial Exhibit 1) and the material supplied by D'Alba; and stenographers and investigators, who described the defendants' confessions.

These incriminating statements were the subject of an extensive voir dire on the issue of voluntariness; petitioner did not testify. The issue was submitted to the jury, over

the objection that the statements were coerced by threats and exploitation of petitioner's alleged difficulty with the English language.

Petitioner and D'Alba were found guilty on all counts submitted to the jury (3064).

On January 4, 1963, petitioner was sentenced to a three-month term of imprisonment on the conspiracy count, and suspended sentences on the five other counts (min. of Jan. 4, 1963, p. 14).

The Original Appeal to the Appellate Division

On the appeal from judgment to the Appellate Division, First Department, petitioner leveled many attacks on the judgment, including contentions that his confessions were coerced, and that the court mischarged the jury as to the standard of proof of voluntariness. The Appellate Division, *per curiam*, dismissed all of these claims as insubstantial, except the challenge to the trial court's instructions as to the voluntariness of the confessions. Upon review of the instructions and the facts, the Court held, 4-1, no error in the instructions. Justice VALENTE, dissenting, believed the challenged instructions inadequate. Neither opinion discussed *Jackson* v. *Denno* [378 U. S. 378 (June 22, 1964)] or *Escobedo* v. *Illinois* [378 U. S. 478 (June 22, 1964)], which were decided after oral argument in the Appellate Division (May 15, 1964), and before the order of affirmance (July 4, 1964).

The Original Appeal to the New York Court of Appeals

On appeal to the Court of Appeals, petitioner abandoned almost all of his previous arguments, turned to the recent decisions in *Jackson* v. *Denno, supra,* and *Escobedo* v. *Illinois, supra,* and contended, among other grounds, that he was entitled to a new trial on all issues, including voluntariness and guilt or innocence; and that *Escobedo* rendered his statements to the Department of Education investigators inadmissible, because no counsel was present and no warning of the right to remain silent was given when the statements were made. After the appellate briefs had been filed, and shortly before oral argument (Jan. 12, 1965), the Court of Appeals rendered its decision in *People* v. *Huntley*, 15 N. Y. 2d 72 (Jan. 7, 1965), authorizing post-trial hearings on voluntariness in cases tried before *Jackson* v. *Denno*. On January 14, 1965, the Court of Appeals entered the following decision in the instant case [15 N. Y. 2d 764, 257 N. Y. S. 2d 337]:

> "Determination of the appeal withheld and case remitted to the Supreme Court, New York County, for further proceedings consistent with the decision in People v. Huntley, 15 N. Y. 2d 72, 255 N. Y. S. 2d 838, 204 N. E. 2d 179, decided by this court on January 7, 1965.
>
> "All concur."

The *Jackson-Denno* Hearing

Pursuant to the direction of the Court of Appeals, a hearing was held in the Supreme Court, New York County, before the trial judge, fully exploring the circumstances re-

lating to the defendants' incriminating statements. The trial record was presented to the court, in accordance with the *Huntley* decision; several of the witnesses at trial testified; additional witnesses appeared; and complete transcripts of the defendants' stenographically recorded statements were introduced. Petitioner did not take the stand. The trial court found his statements voluntary beyond a reasonable doubt, and admissible, and by order entered July 1, 1965, amended the judgment to reflect that finding.*

The Second Appeal to the Court of Appeals

On appeal to the New York Court of Appeals, petitioner contended that his statements were coerced by threats and promises, and that he was deprived of his right to counsel and his privilege against self-incrimination, particularly since he was not advised of the latter rights during the questioning. Respondent argued that the evidence at the hearing added nothing substantial to the evidence that was adduced at trial, except for new facts confirming the voluntariness of the statements. Hence, no cause had been shown for altering the findings that the petitioner's statements were properly obtained.

The petitioner also challenged the fairness of the post-trial hearing on voluntariness.

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* The opinion of the trial court accompanying the order is reproduced in the Appendix, *infra,* for the convenience of this Court.

The Evidence as to Petitioner's Statements*

The content and circumstances of various statements of petitioner Pepe were the subject of testimony of several witnesses at trial, including:

Howard Rice, an investigator with the Division of Professional Conduct of the New York State Department of Education for fourteen years, previously a member of the State Police for fourteen years (1168), six feet one inch tall (1354-5);

Investigator **John Cronin**, a member of the State Police for sixteen years (1042), six feet two inches tall, 188 pounds (1118);

Howard Picard, an investigator with the Department of Education for seventeen years (766-7), formerly with the State Police for fourteen years (782, 793, six feet tall, two hundred pounds (783);

August Bardo, Jr., Director of the Division of Professional Conduct of the New York State Department of Education (968), a member of the New York Bar for fifteen years (969), an investigator with state agencies for fourteen years (994), six feet four inches tall (1010), 220 pounds (1011);

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* The summary that follows covers all of the relevant evidence adduced at the post-trial hearing. Since much of that evidence consisted of the testimony at trial, submitted to the hearing court in the lengthy trial minutes, People's Hearing Exhibit 2, the trial testimony relating to the petitioner's statements is summarized herein, for the sake of clarity and for the convenience of the Court.

The additional evidence adduced at the hearing is included at the appropriate places in the summary, and is distinguished by the notation "H." signifying references to pages of the hearing transcript and the hearing exhibits.

Arthur Velcoff, formerly a hearing reporter with the New York State Department of Education (707-8, 808-9).

At the post-trial hearing, Messrs. **Rice**, **Cronin** and **Picard** testified again. Additional witnesses at the hearing were:

Assistant District Attorney **Jerome Kidder**, Chief of the Frauds Bureau of the New York County District Attorney's Office;

Assistant District Attorney **William J. Jones, Jr.**, member of the Frauds Bureau of the New York County District Attorney's Office;

Alfred H. Pockrass, Secretary to the Council on Accountancy of the New York State Department of Education, who participated in the investigation in the instant case;

Stiles D. Ezell, M.D., formerly Secretary to the New York State Board of Medical Examiners.

July 19, in Pepe's room

Arthur Velcoff testified at the trial that on July 19, 1961, he took down a statement of Dr. Lucio Pepe (707-8, 713-14, 722-4). The statement was at Pepe's home (729), across the street from Brooklyn Doctor's Hospital (730). Present were the hearing reporter, Pepe, Bardo, Picard, Cronin, who was not in uniform, Dr. Luigi Baviello (728), and Alfred Pockrass (730, 731). The interview lasted from 6:15 p.m. to 8:05 p.m. (737-8). During this time, Picard and Pepe left the room on one occasion (738, 740, 742-3).

At trial, portions of the transcript of the interview with Dr. Lucio J. Pepe, on July 19, 1961, at Pepe's living quarters in Brooklyn, were read to the jury (1539-87, 1609-18). At the post-trial hearing the entire transcript was introduced (H. 8; Exh. 3). Pepe was sworn by the hearing reporter, a notary public, and the purpose of the examination was explained to him (1539-41). He claimed not to know whether people were aware of the June examination questions in advance (1541, 1544). According to Pepe, in March Pepe found some notes on the subway train, and thought "maybe this will be the question," because in his school they had the examination questions for the last few years (1544-5, 1547). Mr. Bardo interrupted, asked Pepe not to commit perjury, and advised Pepe to listen to Dr. Luigi Baviello, with whom the investigators had spoken (1547). Baviello, who was present at the interview, told Pepe, "I said that I got the questions from you and you got the questions from Ezell" (1547). Howard Picard then summarized the investigation, and concluded: "* * * Now, please, Doctor, you're under oath, don't further compromise this thing. Look, we're interested in the man you got the question papers from. We're mainly interested in him. We want to clean our own house. We do not want to cause you * * * any more trouble than we have to. If we have to do it the hard way, you're going to the grand jury. Now, why don't you be honest with yourself and tell us the story honestly and openly" (1548). Nevertheless, Pepe repeated his disclaimer (1548-9), while Bardo asked "Why get yourself in any deeper?" (1549).

Picard and Bardo then asked whether Pepe wanted to lose his medical license (1609). "All right," said Picard,

"then cooperate with us and tell us the truth about this thing, because all we want is your cooperation so we'll know what course of action to follow. Now, if you don't help us, necessarily, we're going to involve you, but deep" (1609-10). When Pepe insisted that he did not understand "the reason" or "the way" he would be involved (1610), Picard suggested that certain telephone calls had been traced. "We know a lot of things, Doctor. You're committing perjury. You're under oath. This is perjury you could be sent to jail for. Don't do it, please. Tell us what you know" (1610). Pepe still affirmed his original story (1551-2), adding that he had given the notes, which were handwritten summaries of questions, to Baviello (1549-50), but denying that he had told Baviello to sell them (1550).

At this point, Picard asked Dr. Baviello whether he had told the investigators that Pepe had given him the question papers, which Pepe had received from someone in Albany, and that Baviello had paid Pepe $5,000. Baviello confirmed having reported this. When Dr. Pepe nevertheless asked, "Who gave me $5,000?" Baviello said, "I think at this point, it's better to clarify everything, so we clarify, they will clarify, and maybe they will help us" (H. Exh. 3, pp. 9-10). "Your intelligence should tell you, Doctor," Picard continued, that we're primarily interested in cleaning our own department * * *. Lacking your cooperation, we're going to have to follow some other course of action. That's only natural." He reviewed the extensive investigation, and the evidence obtained from Baviello, other doctors, and the telephone records, and concluded, "I plead with you, don't perjure yourself" (1611-12). "If you don't tell us the truth," said Pockrass, "you may find

yourself before a grand jury, and perhaps facing a criminal indictment, instead of merely departmental action here" (1612). Picard added, "Do you want to go to State Prison? Then tell us the truth" (1612). Bardo also advised Dr. Pepe that they knew the truth. "What are you going to be a sucker for and take it all yourself? Right now it looks as though you got the questions. How did you get them? You got them from somebody. You had better get rid of this thing. Don't keep it all—" (1612). Picard interceded, "Who's going to believe you picked them up on the train? Tell us the truth" (1613). Pepe repeated that he had gotten a "general idea," not questions (1613), and insisted that he had already told where he had obtained the material (1551).

"No," said Bardo. "You better come forward; if you don't, you're a dead pigeon" (1613). Picard asked whether Pepe was "going to take this whole thing all by yourself" (1613). Dr. Pepe, however, again denied getting help from or covering up for Ezell, and said that he had already told the source (1551-2). "If you're back to finding them on the train," said Bardo, "we're not buying it. You're getting yourself in up to here (indicating neck region). Keep going" (1613).

Recalling that an hour earlier Baviello had telephoned Pepe to tell him that they were coming over to question him about the examination, Mr. Pockrass asked whether Pepe had visited an attorney during that hour. Pepe stated that he had gone on a house call, and that he didn't know the name of a lawyer (H. Exh. 3, pp. 13-14). John Cronin of the State Police then spoke to Pepe, reminding

him that the other gentlemen "want to clean their house up in Albany," and advising that no one would believe his story about finding notes on the subway. "Now, nobody's going to believe it, and if you go before that grand jury you'll have your picture in the paper; you'll be so damn embarrassed and you'll wind up losing your license here, and in Italy, because these gentlemen will see to it" (1613-14). "You'll wind up with nothing," added Bardo. "I'll guarantee that" (1614). Cronin continued, "Your only hope is to come truthfully," and he pointed out the "substantiation" that the investigators had, but Pepe insisted "It's the truth" (1552, 1614), and claimed that he had talked to Dr. Ezell once, in 1958. Picard said, "Doctor, all we want is the information from you; then we're going to leave you here and go on about our business." "My dear sir, this is what I have said," Pepe insisted. "I have nothing to say more" (H. Exh. 3, pp. 15-16). He persisted in his denials, although Baviello described the details of their financial transaction, including the return of the money after Ezell called to say there was a switch in the examination (H. Exh. 3, pp. 16-20).

Picard referred again to the grand jury, and warned Pepe that he was putting himself and Baviello in jail (1615). "We made the mistake," said Dr. Baviello, and he advised Pepe to "clarify" everything; "if we say the truth, maybe they will help us" (1615). Picard assured Pepe that they would, but not if Pepe did not want to help himself (1615). "You're a sucker to go it alone," interjected Bardo (1615). Picard urged Pepe to "narrow the path" that they followed, and repeated that the investigators were "mainly concerned with our own family, the

people in Albany" (1615). Pockrass asked whether Pepe got the notes from a woman doctor, and whether a woman doctor was a friend of his, and Pepe said no (H. Exh. 3, p. 21). Then Picard asked Pepe to tell what he could. "We'll forget about the rest of it. You're going to have to trust us, Doctor." He urged Pepe to use his intelligence and make the best of an "embarrassing position." "You don't have to be afraid of anyone up in Albany; that's our department; we'll take care of that" (1615-16). Asked whether he was "afraid," Pepe answered "No. For what? Why?" (1553). Bardo assured Pepe that no one would harm him "physically"—a word that Dr. Pepe professed not to understand (1553, 1616)—and Bardo repeated that Pepe was making a big mistake to "take it alone" with Baviello (1616). Pockrass pointed out that no grand jury would believe Pepe's story about the train, and pointed out that they were "trying to straighten out the facts in the case so we can make sure that all examinations in the future are honest, without the necessity of the intervention" of a grand jury. He reminded Pepe that his friend Dr. Baviello had "flatly contradicted" him. Pepe stuck to his version (1616-17).

At this point, 7:35 p.m., Picard asked Pepe and Baviello to come out in the hall for a minute. "Anything you say" said Pepe. They left the room, returned in about ten minutes (1617), and Picard announced that Pepe had acknowledged receiving $5000 from Baviello, and returning it the next day. "He wants to tell the truth. He wants the break." "This is the truth, this is the truth," insisted Pepe (1554).

Questioned thereafter by Bardo, Picard, and Pockrass, Pepe explained that Ezell had given him certain handwritten material (1581), "the approximate idea" of the questions, in May, 1961, in the street in New York (1554-5, 1582-3, 1585), telling Pepe that this was "probably" the questions, or the "general idea" (1557), in case Pepe had some friends who were eligible for the exam (1555, 1557, 1586). Ezell asked for no money at any time (1558-9). Pepe gave all the material to Baviello, also without asking for money (1559-60, 1575).

At this point in the interview, Baviello stated that he and Pepe had agreed to $20,000, but Pepe contradicted him (1565-6). According to Pepe, Baviello's suggestion of $20,000 was too high, no price was set, and they were to accept whatever money they could get, if any (1567). Shortly before the exam, Baviello came to Pepe with $5,000 (1568). Pepe placed it in his dresser, intending to give some to Ezell (1569-70), but he gave it back to Baviello the next day (1568-9), after Ezell called him and told him that the exam had been switched (1570-1, 1575-7). After a discussion off the record (H. Exh. 3, p. 35), Pepe said that he did not know Dr. Pietro D'Alba (1580).

Pepe also denied having any "help" when he passed the medical examination in December, 1960 (H. Exh. 3, p. 37); he was in touch with Ezell only once, except for a previous meeting for his "eligibility" (*id.* at 38). When Ezell gave him the material on the street corner no one was present, neither doctor, attorney nor politician (*id.* at 46).

At the close of this interview, Bardo said that the investigators would do everything possible to take into consideration Pepe's cooperation, would bring this to the attention of the proper authorities, and would "tell them that you've been helpful, for their consideration" (1617-18).

Howard Picard testified that Pepe expected the investigators when they came to his room, because he was called by Baviello about an hour before (792).

The interviewers told Pepe that he was under oath, and warned him not to perjure himself, because they were seeking the truth, not necessarily because they wanted Pepe to believe that he would be prosecuted for perjury if he did not answer (770-1). In telling Pepe, "You don't have to be afraid of anyone in Albany. That's our department. We'll take care of that" (786-7) [1615-16], Picard was making no promise, but merely assuring Pepe that he need not worry about reprisals from the person in the Albany office who was also involved (787). Picard said at one point that all that the investigators wanted was the information from Pepe, "then we are going to leave you here and go on about our business" (774). This was not a promise that his license would be safeguarded, but a statement that the visitors would only "tie him up long enough for him to tell what he had to say" (790).

Toward the end of the interview, Picard invited Pepe and Baviello out of the room; the three men left the room, and had a ten-minute conversation on the porch (776-8, 787)

[1617]. In this conversation, Picard pointed out that information indicated that Pepe was involved. He attempted to persuade Pepe, through Baviello's presence, that he was not misquoting Baviello. Picard said that they were interested in finding out who in the Department was involved, and he asked Pepe for his cooperation (H. 35, 49-50). During the conversation, Baviello confirmed having told about Pepe's role (H. 49, 59). Pepe admitted that he had received $5,000 from Baviello for question material, that Ezell had given him the material, and that he had later returned the money to Baviello. He asked for consideration. Picard told him that he could promise nothing, but would make a report of Pepe's cooperation, for whatever consideration the proper authorities might want to give it (H. 37, 38, 52). Picard made no promise to Pepe on the porch, and said nothing about giving him a break or a deal (784, 785). When they came back into the room, Picard reported Pepe's admissions and his professed desire to tell the truth, and said "He wants the break" (785, 787-8) [1554]. The latter remarks referred to Pepe's request for consideration in return for his cooperation (H. 38-9).

Picard did not raise his voice during the examination (781), was not "stern" (782), suggested no physical violence at any time, and never threatened Pepe (783). Picard did not tell Pepe that he could refuse to answer questions (794, 798; see also **Pockrass**: H. 204), or that he could consult with counsel (H. 36; see also **Pockrass**: H. 204), but Pepe never declined to answer a question (799). Picard knew during the interview that Pepe came from Italy, and had a "language speech impediment" (794-5).

Arthur Bardo, Jr. testified that he participated in the examination of Dr. Pepe in Pepe's room (986-7, 989). The room was small, about nine feet by ten or eleven feet (989, 1003).

Bardo explained various statements that were made during the interview. At one point, Bardo said to Pepe, "Why get yourself in any deeper?" (990) [1549], meaning under a greater suspicion (990-1). He did not want to worry Pepe, but to persuade him to tell all he knew (990, 991). Shortly thereafter, Picard and Bardo asked whether D'Alba wanted to lose his license (991-2) [1609]; again, Bardo meant that Pepe would best tell the truth (992, 993). During the interrogation, the interviewers spoke in succession, without answers from Pepe; the questions flowed naturally, and there was no intent to work as a "team" or deprive Pepe of a chance to answer (999, 1007). When Bardo said, indicating his neck region, "You are getting yourself in up to here" (1012-13) [1613], he intended to discourage Pepe from lying, because Pepe was under oath (1910-14). When Bardo said, "You will wind up with nothing. I will guarantee that" (1015-16) [1614], his purpose was to assure Pepe's understanding that his telling the truth was desirable, and that he should not perjure himself in the sworn statement (1017). Pepe persisted, so Bardo asked whether he was "afraid," to determine whether there was a reason for Pepe's recalcitrance, not to suggest fear (1019-21) [1553, 1616]. Bardo told Pepe that no one was going to harm him "physically," to reassure Pepe that if he had any fear on the outside, it was groundless, since no one could physically harm him for telling the truth (1022-4) [1553, 1616].

At the end of the interview, Bardo told Pepe that he would do everything he could to take into consideration Pepe's cooperation (1027) [1617-18]. No separate communication devoted to this matter was directed to the Department of Education or the District Attorney's Office, but Bardo's comment and Pepe's statements were transmitted to those agencies as part of the transcript of the interview (1027-9).

Bardo also testified that the investigators did not intend to frighten or threaten Pepe (999-1000, 1002-3, 1006, 1008-9), or to make him feel "closed in" (1003, 1006). In Bardo's years as an investigator, he and his Department never traded on fear, and as a lawyer he abhorred the use of fear (994-5, 997).

John Cronin testified that in Pepe's one room, which was small, were a bed, two chairs, and a dresser (1118-19). During the examination, Cronin spoke in a normal tone (1127, 1131). When Cronin referred to the grand jury, and said to Pepe "You'll be so damn embarrassed and you'll wind up losing your license here, and in Italy, because these gentlemen will see to it" (1131) [1613-14], Cronin's purpose was to get the truth, by frightening Pepe (1134-5, 1136). Cronin did not know, however, whether the other investigators had the power to make trouble for Pepe, or whether they intended to do so (1135). It was possible that he had discussed these consequences with them, but he did not recall such a discussion; that was something he "made up" (H. 188-90). Pepe was sitting on the bed when Cronin spoke. He did not look afraid (1129, 1136). At the time of the interview, the investi-

gators were more interested in the people in Albany, where the papers had come from, than the people in New York (1137).

July 25, at the Department of Education

At trial, portions of the transcript of the **examination of Dr. Pepe on the afternoon of July 25, 1961**, at the offices of the New York State Department of Education (722-3), were read to the jury (1588-96, 1600-8). At the hearing, the entire transcript was placed in evidence (H. 11; Exh. 4). Present at the interview, in addition to Pepe and the stenographer, were Messrs. Picard, Pockrass, Rice and Cronin, and Mildred Henyon, the Examination Editor (1589). Pepe repeated his previous statements with respect to the receipt of the materials from Ezell, and the transfer to Baviello, except that he now placed the meeting with Ezell in late April or early May (1592-4, 1606-7). According to Pepe, he originally called Ezell with respect to an error in his diploma, and the eligibility of a friend. To Pepe's surprise, Ezell offered him the material (1595-6, 1600-3), which Pepe did not read (1594-5). It was Baviello's idea to get money for the material (1605-8); Pepe was not sure whether Baviello gave him $8,000 or $10,000 (1605). Pepe spoke to Ezell last on June 23, when Ezell called from Albany to say that the examination was being switched; he had not spoken to Ezell since the interview on July 19 (1604). When Pepe said this, Picard reminded him, "you know what we're going after; we're not interested in you so much as we're interested in the guy up in Albany" (H. Exh. 4, p. 25).

Most of the interview on July 25, the transcript shows, was not set forth before the jury. The portions not read to the jury related primarily to the question whether Pepe's grades on the 1960 medical examination were improperly raised to a passing mark (H. Exh. 4, pp. 5-6, 9-25, 29-37).

In this discussion, Pepe acknowledged that he had taken the licensing examination four times, passing the last time, in December 1960 (*id.* at 9, 17). He denied speaking to Ezell about reviewing the fourth test (*id.* at 10), later acknowledged that he had asked Ezell for "help" after the examination (*id.* at 15-16, 19-22), although Pepe claimed that his request was made before he learned of his grades (*id.* at 16-17, 22). He apparently evaded questions as to who had advised him to contact Ezell (*id.* at 21). Pepe asserted that the failing marks reflected on his December 1960 test paper, which was shown to him during the interview, were a surprise to him (*id.* at 10-12, 13-14, 18-20); he said "I don't know" when asked whether, and why, Ezell had raised his grades (*id.* at 11-13, 19, 32).

During the questioning about the raising of Pepe's grades, Picard urged Pepe to help the investigators in that matter, warning him to tell the truth or "we'll take your license away from you and put you out of business" (*id.* at 14-15); there was a strong possibility, he said, of Pepe's losing his license "because of fraud" (*id.* at 21). Picard also informed Pepe that there was a "strong possibility this thing may go to the grand jury," Pepe answering that he had "nothing to say about any possibility" (*id.* at 24).

Pepe repeatedly stated that he paid Ezell nothing for the June examination material or for raising his grades (*id.* at 22, 24, 26-7, 30-1, 37). When, toward the close of the interview, Picard told him that "Your story is incredible, Doctor," Pepe insisted "My story is perfect, 100 per cent" (*id.* at 33), and urged Picard, "believe me; like your son, this is the real truth * * *" (*id.* at 37). Thanked for "coming in," Pepe replied, "my pleasure" (*id.* at 36).

Howard Rice testified that on July 25 the investigators wanted to find the "leak" in Albany, by uncovering evidence in New York (1346-8). No one made threatening statements to Pepe (1338-9). When Picard said to Pepe [in discussing the raising of his grades], "We will take your license away from you. We will put you out of business" (1344), this was not a threat, but a "prod," to get Pepe to talk, and to "remember" things not "remembered" up until then (1344-5). In Rice's view, "A little bit of fear helps," and the purpose of such statements is to use fear to help persons to remember (1345). Pepe was not told during the questioning that if he cooperated, influence would be used to help him retain his license (1353). He was not advised of his right to remain silent or to speak to a lawyer (H. 227-8; see also **Pockrass**: H. 204-5).

Pepe appeared at the office without subpoena or other compulsory process, in answer to a telephone call (**Pockrass**: H. 207; see also **Rice**: H. 230).

August 9, at the District Attorney's Office

There was no evidence at trial relating to Pepe's visit to the District Attorney's Office on August 9, 1961. At the hearing, it was stipulated, by written instrument signed by Pepe and his attorney, that if Assistant District Attorneys **Kidder** and **Jones** were witnesses at the hearing, they would testify as follows concerning the interview (H. Exh. 7):

Mr. Kidder telephoned Pepe, and asked him to come to his office (H. Exh. 7, p. 1). [Appearing on the witness stand for cross-examination, Mr. **Kidder** explained that he called Pepe at the hospital, identified himself, and requested Pepe's presence at his office in connection with the investigation (H. 20, 28-9).] Pursuant to the request, Pepe appeared at the District Attorney's Office, where Kidder interviewed him, in Jones's presence (H. Exh. 7, p. 1; **Kidder**: H. 19). The interview lasted forty-five minutes or an hour (**Kidder**: H. 24).

Prior to the questioning, Kidder identified himself as an assistant district attorney, introduced Mr. Jones, and informed Pepe that they were investigating irregularities and possible criminal offenses in connection with the administration of the medical examinations and the issuance of medical licenses (H. Exh. 7, p. 2; **Kidder**: H. 25). He advised Pepe that the evidence indicated that some candidates' grades had been altered improperly, that copies of the examinations had been unlawfully made available to candidates in advance of the examinations, and that Pepe had been guilty of criminal conduct in these areas. The

district attorney, said Kidder, was conducting an extensive investigation into these matters, and would like Pepe's cooperation. Even if he cooperated fully, however, the evidence against him would have to be presented to a grand jury, and the grand jury would in all probability file criminal charges against him (H. Exh. 7, p. 2). But, advised Kidder, Pepe's cooperation would be called to the attention of the court at the time of sentence, and to any other official agency concerned, and the district attorney would recommend that the court and these agencies take Pepe's cooperation into consideration in determining what punishment, if any, should be imposed (*id.* at 3).

Kidder further advised that Pepe's decision whether to cooperate was a very serious matter involving his entire career, that he had a right to consult counsel before deciding, and that he could remain silent (*id.* at 3). [On the stand, Kidder confirmed these facts, and related that his notes on the interview did not reflect the admonitions (H. 19-20, 25-6).] Pepe said that he did not need, or did not want, a lawyer (**Kidder**: H. 26), that he was willing to cooperate with the District Attorney's Office, and that he would answer any questions (H. Exh. 7, p. 3; **Kidder**: H. 26).

Pepe then described his professional employment in the United States, beginning in 1953 (H. Exh. 7, p. 3); his initial contact with Dr. Ezell, which he placed in 1958 (*id.* at 4); his three failures on the medical examination; and his success the fourth time (*id.* at 4). He repeated his story of July 25 as to his conversation with Ezell after he took the fourth examination in December, 1960 (*id.* at 405).

As to the June, 1961 examination, Pepe admitted once more that his original claim of finding the notes in the subway was a lie (**Kidder**: H. 24); again acknowledged that in March or April he met Ezell on the street, where Ezell gave him material relating to the examination (H. Exh. 7, p. 5); still insisted that the material was only a general idea or "summary" of the examination (*id.* at 5, 7); and professed surprise at Ezell's conduct (*id.* at 5). Pepe again admitted giving Baviello the material. But now, contrary to his statements on July 19 and July 25, he asserted that there was no discussion with Baviello about selling the questions until June, when Baviello came to him and, to Pepe's surprise, reported the sale (*id.* at 6). Pepe also claimed now that Baviello gave him no money (*id.* at 7). He again admitted that Ezell had called him to report that the examination had been changed (*id.* at 6).

At the conclusion of the interrogation, Pepe was advised that the prosecutor would like him to appear as a witness before the grand jury, and that he would be asked to sign a waiver of immunity. The waiver was explained to him, and he was advised that he should consult an attorney before deciding whether to sign (*id.* at 7; **Kidder**: 24-5). During the interview, Pepe had some language difficulties, but he was able to express himself clearly, and he never asked for an interpreter. There were no threats, and no promises, other than the promise previously described (*id.* at 7). Pepe made no complaint of threats or promises from other persons (*id.* at 8).

After this meeting Pepe obtained a lawyer, who informed the prosecutors that Pepe would not waive immunity; consequently, Pepe was never called before the grand jury (*id.* at 7).

Other evidence

Stiles D. Ezell, M.D., Secretary to the Board of Medical Examiners during the events in question, testified that his medical license was revoked in 1964, when he was convicted on his plea of guilty of certain charges (H. 88-9, 122, 153). In late February, 1961, Lucio J. Pepe visited Ezell at his office at the Department of Education on 45th Street in Manhattan. During their conversation, Pepe asked whether Ezell could give assistance to some friends who planned to take the medical examination, and said that he would show Ezell his appreciation for the information (H. 94-5, 97, 101-2). In March, at a street-corner meeting on 45th Street initiated by Pepe, Ezell gave Pepe notes that he had prepared, covering the questions on all nine subjects for the forthcoming June medical examination (H. 102, 107, 111). In June, on the Thursday preceding the examination, which was scheduled to begin on a Tuesday, Pepe returned to Ezell's office and gave him $1,000 in cash (H. 115-16, 150). But on Sunday, at Grand Central Station, Ezell returned the money to Pepe, having informed Pepe that there was an investigation and the examination had been changed (H. 116-17, 151).

While Ezell was on the witness stand, the hearing court rejected the People's offer of proof that Pepe had paid Ezell for raising his examination grades (H. 90-1, 97-9, 114, 163, 187-8).

ARGUMENT

POINT I

The hearing court's finding of voluntariness, under traditional tests, is amply supported by the record.

Petitioner claims that under "traditional" tests of voluntariness, his statements were inadmissible. His claims of coercion were the subject of an extensive *voir dire* at trial. Pursuant to the mandate of the New York Court of Appeals, a comprehensive hearing was held in the trial court, at which the petitioner had full opportunity of presenting additional evidence relating to his statements. Although expanding his legal claims, he presented no new facts of importance. But the People, unfettered by the caution inherent in a jury trial, and able to clarify some points, produced significant additional proof of voluntariness. On all of the evidence, the hearing court found the petitioner's statements admissible. The Appellate Division and the Court of Appeals have unanimously affirmed. The record amply supports the hearing court's findings.

The primary facts were undisputed. Indeed, the facts relied upon by petitioner Pepe to show official overreaching, consisting of certain statements by the investigators, were reflected in the stenographically recorded transcript of the interview at his room. Although Pepe made no claim at trial, either by testimony, argument to the jury (2762-3, 2777, 2792-802) or requests to charge (3087, 3089, 3090-1) that his confessions were induced by promises of immunity, and he made no such argument on appeal from judgment, at the post-trial hearing he urged that interpretation of the

investigator's statements. Pepe also contended at trial, on the original appeal, and at the hearing that the interrogator's statements constituted coercive threats. He renewed both arguments on the State appeal after the hearing, and presents them again here. The record refutes him; under classical standards of voluntariness, no improper threats or promises were made.

It may be noted that before speaking to Dr. Pepe for the first time, on July 19, the investigators had gained significant information about the "leak." They had received statements from candidates that Pietro D'Alba gave them test material in advance, they had learned from D'Alba on July 18 that he got the papers from Baviello (1176, 1178, 1224, 1458-9), and they were informed by Baviello on July 19 (H. Exh. 3, pp. 4-5, 9) that his source was Pepe, who, said Baviello, claimed to have gotten the questions from someone in Albany (*ibid.*). Diligently pursuing the inquiry without delay, and entitled to believe that exposure of the major offender, a corrupt public officer, might be imminent, the investigators visited Dr. Pepe at his room near the hospital. Their association with him proceeded from the start in a noncoercive atmosphere. Baviello called Pepe an hour before the visit to announce their intention (792; Exh. 3, pp. 14-15). Thus forewarning Pepe, enabling him to prepare himself and consult others, the authorities pursued a course inconsistent with a desire to exert pressure. The interview began at a reasonable hour, 6:15 p.m., and occurred in familiar surroundings.

At the outset the purpose of the inquiry was forthrightly explained. Then Pepe was asked about his role

in the distribution of the material, and his source, and he gave his initial version: he found some notes in the subway, thought they might be questions for the examination, and gave them to Baviello, but he never told Baviello to sell them, and did not know whether any persons were aware of the examination questions in advance. In the course of this conversation, the investigators made certain allegedly coercive statements to Pepe about the possible prospects if he persisted in hiding the truth, including a prosecution for perjury (H. Exh. 3, pp. 5, 7, 10), inquiry by the grand jury, a prison sentence (H. Exh. 3, pp. 6, 10-11, 15, 20, 22-3), involvement "deep" (H. Exh. 3, p. 7), and loss of his license (H. Exh. 3, pp. 6-7, 15). While severe, these potential consequences were reasonably related to the situation. Pepe, a medical doctor licensed by the State, had apparently committed acts aimed at the heart of the integrity and safety of his profession, was brazenly lying and refusing to cooperate, and was obstructing the important task of discovering the source of the disclosures. Further, at the time of the statements Pepe was not under arrest, the prospects described were distant, and did not entail an immediate answer, and he was not prevented from leaving or communicating with others pending his decision. And Pepe was no timid, frightened suspect, but a mature, intelligent, cunning and well-educated professional man. He insisted that he was not afraid (1553; H. Exh. 3, p. 22), he showed no signs of fear (1129, 1136), and his responses to the visitors' conscientious questions were punctuated with arrogant, self-righteous protestations of innocence.

During the colloquy, the investigators also suggested that if Dr. Pepe told the truth at that time he might avoid

the grand jury (H. Exh. 3, p. 23), or face "merely departmental action" (*id.* at 10-11), and they made other remarks that apparently form the basis for Pepe's present claim of promises of immunity (*id.* at 7, 16, 22). But with these phrases in context, Pepe's interpretation is disproved. The remarks that Pepe incorrectly calls improper threats, discussed above, made it clear that the investigation concerned a criminal matter. The visitors explained that they knew he had "played" a "part" in the plot (*id.* at 5). While pointing out that their principal aim was to expose the "bad root" in Albany, the remarks that communicated this purpose showed that the investigators were also interested in Pepe (*id.* at 5, 10, 21). The thrust of their statements was that Pepe would be in "trouble" (*id.* at 6) even if he cooperated, and that he had to "make the best of it" (*id.* at 22). Further, they frequently advised Pepe not to "take it all" himself and "go it alone" (*id.* at 11, 12, 21); as Mr. Bardo said, "Why should you two fellows take it alone and let him go free?" (*id.* at 22). In urging Pepe in this manner to share his responsibility with the "man in Albany," the investigators hardly conveyed a promise of immunity, particularly since Pepe's confederate Baviello, who had already confessed, was designated as one of those who had to "take it." Baviello, who was also indicted, expressed the same interpretation of the investigators' intentions (*id.* at 9-10, 20-1). Thus, "in this instance, the record is clear," Pepe "was on the target even if perchance he was not to be the bull's eye" [*cf. People* v. *Laino*, 10 N.Y.2d 161, 170, (1961)].

After this conversation, at 7:25 p.m., Picard invited Pepe and Baviello to join him on the porch. "Anything

you say," agreed Pepe, and they left the room (1617). The ensuing ten-minute discussion, the turning point in Pepe's attitude, confirms that his incriminating statements thereafter were not the product of improper pressure. Pepe was faced with Baviello's renewed assurances that he had directly implicated Pepe in the conspiracy. It is impossible to see how this direct confrontation with Baviello's serious accusation could have "lulled Pepe into a false sense of security" (petition, p. 29). And such confrontation with evidence produced by independent investigation has consistently merited judicial approval [see *United States ex rel. Daniel* v. *Wilkins*, 292 F.2d 348 (2d Cir. 1961), *cert. denied* 372 U. S. 917, 950 (1963)]. Petitioner's comparison of his case with *Spano* v. *New York*, 360 U. S. 315 (1959) is unconvincing. In *Spano*, the defendant, a young man, was under arrest, was questioned for eight hours late at night in strange surroundings, and was repeatedly denied access to counsel, and a "false friend" of his in the police department persistently urged him to confess, misrepresented his own role and played upon the defendant's sympathies with false statements that if he did not confess he would jeopardize his friend's job and the welfare of his family. *Spano* did not hold that investigators may not use a suspect's friend to persuade him to reveal the truth. That circumstance, said the Court, was merely "another factor which deserves mention in the totality of the situation" on the issue of voluntariness [360 U. S. at 323]. In sum, the confrontation between Baviello and petitioner was proper.

Doubtless Pepe realized when Baviello spoke that the investigators' account of the evidence was no bluff, and that

no one would believe his patent lie about his source of the questions—a lie which, as Bardo had suggested, had already gotten him "in" up to his neck (1613). Pepe therefore acknowledged the essentials of Baviello's report, and named Dr. Ezell as the supplier of the examination material. But then the resourceful Pepe, not prone to part with valuable information for nothing, asked for "consideration." Picard replied that he could make no promises, but would report Pepe's cooperation to the proper authorities (784, 785; H. 37, 38, 52). When they rejoined the group in Pepe's room, Picard reported Pepe's wish for consideration by announcing that Pepe wanted the "break" (785, 787-8, 1554; H. 38-9). While Picard's phraseology on its face might conceivably be deemed somewhat cryptic, in the context of the previous discussion on the porch the meaning was clear, and not sinister. Picard's putting his comment on the record confirms that his motives were fair.

The investigators' and Pepe's behavior thereafter further proves that all parties, including Pepe, understood that possible consideration, not immunity from prosecution, was the only favor that Pepe could expect, and that his revelations were not the product of fear. While admitting substantially, upon his return to the room, his participation with Ezell and Baviello, Pepe reaffirmed his denials that he paid Ezell for the material, and he disclaimed any knowledge of the raising of his grades on the December 1960 examination. This persistence in exculpatory stories is strong evidence that his "will" was not "overborne" by the interrogators, and that his decision to give the other information was "freely self-determined" [see *Rogers* v. *Richmond*, 365 U. S. 534, 544 (1961)]. As to the "prom-

ise," at the close of the meeting the immediate director of the investigation, attorney Bardo, confirmed the parties' understanding:

> "We're going to do everything we can to take into consideration the fact that you've cooperated with us here, and, as I said to you, we're anxious to find out, di[g] this thing out by the roots. You've done your part, and we'll bring this to the attention of the proper authorities, and we'll tell them that you've been helpful, for their consideration" (1617-18; H. Exh. 3, p. 45).

Pepe expressed no dissatisfaction with this summary of the arrangement.

Six days later he went voluntarily to the office of the Department of Education, after ample opportunity for seeking outside advice and reflecting upon his situation, and without any threats or promises he repeated his statement (H. Exh. 4, pp. 2-9). In the remaining portion of the interview, he again denied paying Ezell for any purpose, or having his grades raised. Significantly, the latter denials were given after the investigators warned him that his license could be removed (*id.* at 14-15, 21), and that there was a "strong possibility this thing may go to the grand jury" (*id.* at 24), additional proof that the admissions of July 19, which followed similar warnings, were not the product of fear.

Bardo's promise of consideration, quoted above, was transmitted to the district attorney as part of the transcript of the interview (1027-9; H. 23-4). On August 9, Pepe went to the District Attorney's Office, and Mr. Kidder repeated the promise. On this occasion, he advised Pepe that he could refuse to talk, and, precluding any possible ambiguity in Pepe's situation, informed him that the

evidence indicated that Pepe had been guilty of criminal conduct in respect to the examinations, that even if he cooperated the evidence would be presented to a grand jury, and that in all probability he would be charged with a crime (H. Exh. 7, p. 2). Amplifying the prior promise, he stated that Pepe's cooperation would be called to the attention of the court at sentencing, and that the prosecutor would recommend to the court and other agencies that it be taken into consideration (*id.* at 3). Again, Pepe accepted this description of his status. Declining an opportunity to consult counsel (H. 26), Pepe reasserted his willingness to cooperate, and though minimizing now the financial aspects of the conspiracy, largely repeated his prior admissions.

In short, on the whole record, Pepe's statements reflected a deliberate choice whether to talk or remain silent; and the investigators' assurances of possible leniency if Pepe told the truth, given on July 19, were spoken in good faith, and expressed no promise of immunity.

POINT II

The newly expanded application of the Fifth Amendment in *Garrity* v. *New Jersey* does not apply to petitioner's statements.

Petitioner's principal claim is that apart from "traditional" standards of voluntariness, use at his trial in 1962 of his statements to the Department of Education investigators was precluded by this Court's recent decision in *Garrity* v. *New Jersey* [—— U. S. ——, 17 L.Ed.2d 562 (1967); see also *Spevack* v. *Klein*, —— U. S. ——, 17 L.Ed.2d 574 (1967)]. *Garrity* held the Fifth Amendment offended by obtaining incriminating statements from police

officers upon the threat that, pursuant to a state statute, their claim of the privilege against self-incrimination would subject them to discharge from office. Petitioner contends that the threat of loss of his medical license conveyed to him before he confessed falls within the *Garrity* ruling. We disagree. The facts of the two cases are distinct; further, *Garrity* should not be applied retroactively to cases long since tried.

(a) This case is distinguishable from *Garrity* on the facts.

The defendants in *Garrity* were threatened with discharge if they refused to answer questions on the ground of the Fifth Amendment; the threat was rendered pursuant to a state statute providing for removal from public office solely, and expressly, for claiming the constitutional privilege against self-incrimination. Thus, the wrong condemned in *Garrity* was the "exaction of a price" [17 L.Ed. 2d at 567] specifically and automatically for the exercise of a constitutional right. Similarly, in *Spevack* v. *Klein*, the Court held that the Fifth Amendment proscribed disbarment as a specific "penalty" for asserting the constitutional privilege of silence [17 L.Ed2d at 577]. But here, the loss of license which petitioner faced was not automatic, and the conduct that the investigators said would jeopardize his license was not the assertion of the privilege against self-incrimination, but his deliberate affirmative obstruction of the investigators by false answers designed to lead them astray.

It may be recalled that before the investigators interviewed Dr. Pepe, they had learned from medical students that Pietro D'Alba had given candidates the examination

material in advance of the examination; D'Alba had revealed on July 18, the day before Pepe was questioned, that he had obtained the material from Baviello; and Baviello had just told them, on July 19, that he received the questions from Pepe, who said he had obtained them from someone in Albany (H. Exh. 3, pp. 4-5, 9)—where State officials had composed and filed the examination. Yet the investigators' proper attempts to learn from Pepe the source of the serious breach in professional and official integrity were brazenly rebuffed. When asked straightforwardly about his knowledge of the scandal, Pepe falsely claimed ignorance of any leak, and ridiculously claimed that he had found the notes on the subway. Pepe persisted in this fabrication, despite the visitors' reasonable advice not to commit perjury, and Baviello's announcements that the investigators knew that Pepe had given him the material. When the interrogators' repeated requests to help them "clean our own house" in Albany and guarantee the honesty of future medical examinations had been met with patent lies, the investigators warned Dr. Pepe that nobody would believe his story, and that if he went before the grand jury he would "wind up losing your license here, and in Italy" (1613-14; see 1609). Thus, the threat to petitioner's license was only remotely connected to his answers on July 19, and unrelated to an assertion of constitutional rights.

Not only did the questioning here lack the formal, statutory threat of loss of employment for the invocation of a constitutional right which was condemned in *Garrity,* but there is even doubt as to the effect of the investigators' reference to the medical license. Petitioner's obstinacy continued for some time after the interrogators spoke of

the license. He finally agreed to cooperate when accomplice Baviello and investigator Picard spoke to him on the porch, without any reference to his license, and Baviello again confirmed that he had implicated Pepe and that Pepe had said he got the questions from someone in Albany; then, Pepe revealed that his source was Dr. Ezell, Secretary of the State Board of Medical Examiners. He repeated this statement six days later, on July 25, at the office of the Department of Education, with no threats whatever. It was also established, at the post-trial hearing, that at the interview on July 25 Dr. Pepe was asked about the improper raising of his grades on the 1960 medical examination to a passing mark. When he disclaimed knowledge, despite confrontation with the failing marks on his 1960 test paper, he was warned that he could lose his license because of fraud, but he did not change his statement. Further, Pepe repeated his admissions at the District Attorney's Office on August 9, after clear warnings as to his unqualified right to remain silent.

(b) *Garrity* v. *New Jersey* should not be applied retroactively.

Petitioner's trial was concluded in May, 1962, the Appellate Division affirmed his conviction in July, 1964, and the Court of Appeals' initial determination, remanding the case for a hearing as to voluntariness, was rendered in January, 1965. After the hearing and the second appeal to the Appellate Division, the Court of Appeals upheld the hearing court's ruling on December 29, 1966. The decision in *Garrity* v. *New Jersey* was rendered on January 16, 1967, almost five years after petitioner's trial, and two years after his initial appeal to the Court of Appeals.

It is clear that *Garrity* announced "new law," as that term is used in the jurisprudence of retroactivity. Although the *Garrity* opinion was couched in terms of the Fourteenth Amendment, and refers to "coercion that vitiates a confession," *Garrity* went beyond traditional tests of voluntariness, as petitioner apparently concedes. The Fifth Amendment and the privilege against self-incrimination, cited throughout the opinion, form the foundation of the *Garrity* reasoning. Yet, when petitioner was tried, the Fifth Amendment did not even apply to the States [see *Malloy* v. *Hogan,* 378 U. S. 1 (1964)]. This Court has on several occasions recently pointed out that "in criminal litigation concerning constitutional claims, 'the Court may in the interest of justice make the rule prospective * * * where the exigencies of the situation require such an application' " [*Johnson* v. *New Jersey,* 384 U. S. 719, 16 L.Ed. 2d 882, 888 (1966)]. To date, every Fifth Amendment ruling has been held prospective. The rules of custodial interrogation announced in *Miranda* v. *Arizona,* 384 U. S. 436 (1966) do not apply to cases that were tried before *Miranda* was decided [*Johnson* v. *New Jersey, supra*]. The Fifth Amendment prohibition against comment upon the defendant's silence at trial, newly announced in *Griffin* v. *California,* 380 U. S. 609 (1965), is not retroactive [*Tehan* v. *Shott,* 382 U. S. 406 (1966)]. The reasoning of the *Johnson* and *Shott* cases applies equally here.

In those cases, the Court looked first to the "purpose" of the new Fifth Amendment standards. In *Johnson* the Court found in *Miranda* a policy deterring coercive interrogation; to the extent that this same purpose supported the *Garrity* ruling, prospectivity is indicated. In *Tehan* v.

Shott the Court discerned in *Griffin* v. *California* a purpose of discouraging "penalizing" the assertion of a constitutional right; this appears to be the primary policy of the *Garrity* decision, and, of course, points to prospectivity here as well. Moreover, another consideration in *Johnson* and *Shott* favoring prospectivity was that the previous failure to follow the new standards did not affect the integrity of the fact-finding process. In the instant case as well, traditional standards of voluntariness, coupled with the separate hearing before the judge, adequately insured the integrity of the trial and the verdict of guilt.

In addition to the "purpose" of the new rules, another factor indicating prospective application of *Miranda* and *Griffin* was the reliance placed by police, courts and prosecutors on the previous rules. This Court's discussion of the reliance upon pre-*Miranda* law is particularly pertinent here [*Johnson* v. *New Jersey*, 16 L.Ed.2d at 891-892]:

> "All of the reasons set forth above for making Escobedo and Miranda non-retroactive suggest that these decisions should apply only to trials begun after the decisions were announced. Future defendants will benefit fully from our new standards governing in-custody interrogation, while past defendants may still avail themselves of the voluntariness test. Law enforcement officers and trial courts will have fair notice that statements taken in violation of these standards may not be used against an accused. Prospective application only to trials begun after the standards were announced is particularly appropriate here. Authorities attempting to protect the privilege have not been apprised heretofore of the specific safeguards which are now obligatory. Consequently they have adopted devices which, although below the constitutional minimum, were not intentional evasions of the requirements of the privilege."

Finally, the effect of retroactivity upon the administration of justice, the third factor supporting the *Johnson* and *Shott* decisions, also suggests prospectivity here. While the number of cases affected by *Garrity* would be smaller than those affected by *Miranda* or *Griffin,* still it may be presumed that a significant number of convictions of undeniably guilty persons would be needlessly overturned if *Garrity* were retroactive, especially in states like New York where public officers who signed waivers of immunity and testified rather than risk loss of office were subsequently convicted of crimes [*cf. Stevens* v. *Marks,* 383 U. S. 234 (1966)].

POINT III

Petitioner's challenge to the fairness of the hearing was not passed on by the Court of Appeals, and is without merit.

Petitioner claims a deprivation of equal protection and due process in allowing the People to introduce at the post-trial hearing on voluntariness evidence that had not been presented to the jury. This claim was not presented to the Court of Appeals, and that Court's amended remittitur gives no indication that the claim was passed upon.*

* The order of the New York Court of Appeals, dated March 2, 1967, is as follows:

> "Motion by appellant Pepe to amend the remittitur granted; the return of the remittitur requested and, when returned, it will be amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: Defendant Pepe contended that his rights under the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States were violated in connection with certain statements given by him to the authorities. The Court of Appeals held that appellant Pepe's constitutional rights were not violated."

On the latest appeal to the Court of Appeals, petitioner did challenge the use of additional evidence at the hearing, although not in the terms raised in the petition. Noting that the hearing elicited evidence that was not presented at the trial, he curiously claimed denial of the "constitutional right to have a jury pass on all the evidence" (brief, p. 24). Presumably, petitioner referred to the New York constitution, since the federal constitution conveys no right to a jury determination as to voluntariness [*Jackson* v. *Denno*, 378 U. S. 368]. The authoritative interpretation of the State constitution on this point was announced in *People* v. *Huntley* [15 N.Y.2d 72, 77 (1965)]. Speaking of hearings conducted after trials already completed, the New York Court of Appeals ruled:

> "As to the type of hearing to be had, there is no constitutional impediment to using the prior record provided that the defendant and the People are permitted to put in additional proof if either side so desires."

Absent from petitioner's puzzling argument, moreover, was an explanation why he did not avail himself of his "right" when the issue of voluntariness was presented to the jury.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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